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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

JIMMY W. MILES,)	
)	
Plaintiff,)	
)	
v.)	Case No. 03-3353
)	
STATE OF KANSAS, et al.,)	
)	
Defendants.)	
_____)	

MEMORANDUM ORDER AND OPINION GRANTING MOTION TO DISMISS

This matter is before the Court on plaintiff Jimmy W. Miles' Motion to Dismiss (Doc. 46). Plaintiff, who is acting *pro se*, seeks to dismiss his case without prejudice pursuant to Fed. R. Civ. P. 41(a)(1). Defendants object to a dismissal without prejudice. For the reasons stated below, plaintiff's motion is granted.

This is a civil rights case filed pursuant to 42 U.S.C. § 1983 by plaintiff who currently resides in the Kansas Sexual Predator Treatment Program at Larned State Hospital. Defendants have filed a *Martinez*¹ Report and a Motion to Dismiss pursuant to Fed. R. Civ. P. 12(b)(6). Plaintiff has failed to timely respond to both the *Martinez* Report and Motion to Dismiss, and seeks to dismiss his case without prejudice. Defendants have not yet filed an answer or a summary judgment motion in this action.

Rule 41(a)(1) controls voluntary dismissals and provides *inter alia*:

¹*Martinez v. Aaron*, 570 F.2d 317 (10th Cir. 1978).

“[A]n action may be dismissed by the plaintiff without order of the court (1) by filing a notice of dismissal at any time before service by the adverse party of an answer or of a motion for summary judgment, whichever first occurs . . . Unless otherwise stated in the notice of dismissal or stipulation, the dismissal is without prejudice”²

Defendants ask the Court to consider the legal prejudice they will suffer if the Court grants plaintiff’s motion to dismiss without prejudice. Rule 41(a)(1), however, does not provide discretion for a court to consider other reasons for preventing dismissal.³ Instead, Rule 41 creates a bright line rule, and only the service of an answer or a summary judgment motion will prevent a plaintiff from voluntarily dismissing his case.⁴ Because defendants have not served plaintiff with an answer or a summary judgment motion, plaintiff is entitled to a dismissal without prejudice pursuant to Rule 41(a)(1) as a matter of right.⁵

IT IS THEREFORE ORDERED BY THE COURT that plaintiff’s Motion to Dismiss his case without prejudice is GRANTED.

IT IS SO ORDERED.

Dated this 13th day of August 2004.

S/ Julie A. Robinson
Julie A. Robinson
United States District Judge

²Fed. R. Civ. P. 41(a)(1).

³*Muller v. TSC Indus., Inc.*, Civ. 92-4084, 1992 WL 223766 at *1 (D. Kan. August 26, 1992).

⁴*See id.* (citing *Exxon Corp. v. Maryland Cas. Co.*, 599 F.2d 659, 661 (5th Cir. 1979).

⁵*Netwig v. Georgia Pac. Co.*, 375 F.3d 1009, 1010 (10th Cir. 2004) (when no answer or summary judgment motion has been filed, under the plain language of Rule 41(a)(1), a plaintiff has the right to voluntarily dismiss his case without court order); *Janssen v. Harris*, 321 F.3d 998, 1000 (10th Cir. 2003) (Under Rule 41(a)(1), “a plaintiff has an absolute right to dismiss [his case] without prejudice”).